IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 987 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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IBRAHIM ABDURRAHMAN KHANUWALA - Appellant(s)

Versus

MOHAMMAD RAFIK M.PATEL & 1 - Defendant(s)

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Appearance :

MR MTM HAKIM for Petitioner No(s).: 1.

NOTICE SERVED BY DS for Respondent No(s).: 1.

MR DAKSHESH MEHTA for Respondent No(s).: 2.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 23/08/2005

ORAL JUDGMENT

This appeal arises out of the judgment and order rendered by the Commissioner appointed under the Workman's Compensations Act, Vadodara in W.C. Application No.12/2001 of 9th of February, 2005.

2.The appellant was the claimant before the learned Commissioner and, therefore, he is addressed to as such in this appeal. The claim was preferred against the respondent No.1, the owner of auto-rickshaw and insurer of the said auto-rickshaw, and for convenience, they are addressed to as opponents No.1 and 2 respectively in this judgment.

3.The claimant met with an accident on 18th March, 2000. His claim is that he was working as a driver of the auto-rickshaw owned by opponent No.1 and was drawing the salary for Rs.2,400/- per month. At the relevant time, while he was standing near the auto-rickshaw, he was knocked down by a Luna moped. The claimant sustained compound comminuted fracture into his right Tibya Fibula which ultimately has been certified to have resulted into permanent partial disability to the extent of 15% by Dr.Rajiv Shah, Orthopedic Surgeon, Vadodara. The claimant preferred claim for Rs.70,446/- as compensation under the W. C. Act, with interest @ 15% against his employer, opponent No.1 and the insurer of the rickshaw, opponent No.2. He did not join the driver, owner or insurer of the Luna as party opponent.

4.The learned Workman's Compensation Commissioner after

considering the evidence led by parties, came to a conclusion that the injuries sustained by the claimant has not resulted into any loss of earning capacity and, therefore, he would not be entitled to claim for compensation under the W.C. Act.

4.1 The learned Commissioner also turned down the request of the claimant to award compensation under Section 140 of the Motor Vehicles Act, on reasoning that the claimant had not taken any such plea in his application and the other side had no opportunity to meet with such a case. Learned Commissioner ultimately, dismissed the claim and hence, this Appeal.

5. On earlier occasion by an order dated 21st of April, 2005, Notice to opponents was issued for final disposal. Accordingly, opponent No.2 has appeared through learned Advocate Mr.Mehta and opponent No.1 has chosen not to contest this appeal.

6. Learned Advocate Mr.Hakim, appearing for the appellant contended that the learned Commissioner has erred in not exercising his powers under W.C.Act, and / or powers under Section 140 of the Motor Vehicles Act.

According to Mr.Hakim, strict rules of evidence and procedure are not required to be followed and adhered to in such benevolent Legislations. Learned W.C. Commissioner has erred in strictly following the principles of evidence.

6.1 Learned Advocate Mr.Hakim submitted that in light of provisions contained in Section 140 of the Motor Vehicles Act, the W.C. Commissioner could have exercised the power and awarded compensation under Section 140 of the Motor Vehicles Act, when there is sufficient material to show that the injuries have resulted out of use of vehicle and are of a permanent nature. He submitted that the claimant was driver of the auto-rickshaw and, therefore, the injuries can be said to have resulted out of use of the auto-rickshaw and, therefore, the compensation under Section 140 of the Motor Vehicles Act, ought to have been awarded. Second contention raised by Mr.Hakim is that the learned Commissioner has ignored the fact that the claimant has sustained permanent partial disability to the extent of 15% as certified by the Doctor. That disablement of right leg would, naturally result into some functional loss and consequent earning capacity. Ignoring that learned Commissioner has followed the

principles of evidence in strict sense and conducted that there was no loss in earning capacity. Assessment of disability ought to have been undertaken by the Commissioner himself in light of the medical evidence and compensation awarded, if not at 15%, at some lesser percentage. Mr.Hakim submitted that this Appeal may be entertained and compensation be awarded to the claimant.

7. Mr.Mehta, learned Advocate appearing for opponent No.2, submitted that there is no question of awarding any compensation under Section 140 of the Motor Vehicles Act. Mr.Mehta submitted that claimant had not raised this plea before the learned Commissioner and learned Commissioner has rejected this contention raised by learned Advocate at the last moment on the ground that opponents had no chance to meet with such a contention by leading appropriate evidence. Mr.Mehta also contended that the driver, owner and insurer of the vehicle, which has caused the accident are not party. Opponent No.1 is the owner of the rickshaw. Opponent No.2 is the insurer of the rickshaw, and therefore, learned Commissioner has rightly refused to exercise the powers under Section 140 of the Motor Vehicles Act.

7.1 So far as the claim under W. C. Act is concerned, Mr.Mehta has drawn the attention of this Court, to Section 4 of the W.C. Act and submitted that keeping that provision in light, learned Commissioner has rightly refused to award any compensation. Mr.Mehta submitted that there is not even an iota of an evidence to show that the claimant has sustained any disability resulting into loss of earning capacity. Mr.Mehta submitted that the claimant has not deposed about any disability. The Doctor has given the certificate about disability of a nature which will not be obstructive in function as a driver and therefore, the Commissioner has rightly rejected the claim of the claimant. Appeal therefore, may be dismissed.

8. This Court had advantage of going through the deposition of the claimant. The Doctor has not been examined but, reliance is placed on medical certificate, which is also quoted by the learned Commissioner in his judgment. Barring these two pieces of evidence, no other evidence is led by the claimant undisputedly.

9.Despite a close scrutiny of deposition of the claimant, this Court was at loss to find out any material to show that the claimant claims to have sustained permanent partial disablement resulting in reduction in his earning capacity. There is not a word to show that he is not able to drive or that he is finding any difficulty in driving the auto-rickshaw. On the contrary, it has come on record during cross-examination that while his deposition was recorded, he was still holding a badge for driving a rickshaw and, he has shown his readiness to produce the same. Differently put, from the evidence of the claimant, there is no material to even infer that he has sustained any functional disability as a driver, which may result into any loss in his earning capacity.

9.1 Now, if the medical certificate is seen, the Doctor says that he had examined the claimant for assessment of permanent partial disablement. The Doctor has certified as under.

"Mr.Ibrahimbhai A. Khanuwala aged 60 years Male, resident of Panigate Vadodara was examined and assessed by me for partial permanent disability.

Patient met with a vehicular accident on 18/3/2000 and had compound comminuted fracture right Libya fibula for which interlocking nailing was performed.

On examination of right lower limb foot and ankle has normal range of motion with normal power. In knee, range of motion is 0-130 with normal power. Patient can sit cross-legged but the squatting is incomplete and painful. Patient cannot knee down for Namaz."

It is thus clear from the medical certificate, that the range of knee movement was 0 to 130 degree with normal power and as per the Doctor, the disability that the claimant may suffer would be in squatting and in kneeling for Namaj. Differently put Doctor does not certify that the claimant may have difficulty in driving auto-rickshaw.

9.2Thus, it is clear that the claimant has not led any evidence to show that he has sustained either any scheduled injury or unscheduled injury of permanent nature resulting into any loss of earning capacity. There is no evidence to show that 15% disability certified by the Doctor was after having due regard to the percentages of loss of earning capacity indicated in the schedule – 1 of W.C. Act, keeping in light of the provision contained in Section 4 of W.C. Act. Therefore, no error can be said to have been committed by the learned Workman's Compensation Commissioner, in not awarding any compensation under the Act.

9.3Learned Advocate Mr.Hakim has relied on decision in

case of **Govind Kana Vs. Kana Tida Mokaria reported in 1989 1 G.L.R. 122**. He submitted that strict rules of evidence are not to be adhered to in proceedings under Workman's Compensation Act. He submitted that where a document is admitted in evidence, formal proof regarding that document is not necessary and, there is medical certificate on record of the case to show that 15% disability was sustained by the claimant, which has not been considered by the learned Commissioner.

9.4There cannot be any different opinion than what is expressed by the Division Bench of this Court in case of Govind Kana (supra), that formal proof of the certificate was not required before the learned Workman's Compensation Commissioner once it was taken on record on admission by other side. This Court has also not turned down the case of the appellant – claimant for want of evidence. But the case is turned down on evaluation of evidence. The medical certificate has been accepted on face value but, the certificate does not reflect that it is issued after considering the schedule – 1 under the W.C. Act, nor does it indicate that the workman would not be able to drive or would have difficulty in driving, coupled with the fact that the claimant himself also not

deposed that he is facing any difficulty in driving. It is on this account that compensation is refused to the claimant by learned W.C. Commissioner and appeal has to fail.

10. Considering the question of awarding compensation under Section 140 of the Motor Vehicles Act, it has to be noted that undisputedly the accident occurred while the claimant was standing besides the rickshaw, he was hit by Luna. There was no impact to or by auto-rickshaw. He cannot be said to have sustained injuries out of use of auto-rickshaw. The accident and the resultant injuries can be said to be out of use of Luna but, not auto-rickshaw, and therefore, owner and insurer of the auto-rickshaw cannot be saddled with any liability to pay any compensation in exercise of powers under Section 140 of the Motor Vehicles Act.

11. Last but not the least, it would also be appropriate to note that no substantial question of law is found or indicated to arise apart from factual contentions indicated above, and therefore, also, this Appeal cannot be entertained. The appeal, therefore, fails on all counts and, is dismissed. Notice is discharged.

No costs.

(A.L.DAVE, J.)

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